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NO.

In the Supreme Court of the United States

OCTOBER TERM, 1992

TONY ROBINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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26 pp

QUESTIONS PRESENTED FOR REVIEW

I. Whether the policy of the United States Border Patrol of opening the luggage bins of Greyhound buses that pass through permanent checkpoints and subjecting the interior to a canine sniff exceeds the permissible bounds granted by the Supreme Court in *Martinez-Fuerte* for temporary detentions at permanent checkpoints.

II. Whether appellant's incriminating statements were the result of an illegal arrest in violation of the Fourth Amendment to the United States Constitution.

PARTIES TO THE PROCEEDING

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

TONY ROBINSON
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Tony Robinson respectfully prays that a Writ of Certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on October 9, 1992.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the court whose judgment is sought to be reviewed are contained in the caption of the case before this Honorable Court.

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OPINION BELOW

The unpublished opinion of the court of appeals, styled *United States of America v. Tony Robinson* and numbered Cause No. 92-8138, was entered on October 9, 1992. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

This petition is filed within ninety (90) days from October 9, 1992, the date on which the opinion and judgment of the United States Court of Appeals for the Fifth Circuit was entered. SUP.CT.R. 13.1. Jurisdiction of this Court to review the judgment in question through certiorari is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT

The basis for federal jurisdiction in the court of first instance was 18 U.S.C. § 3231.

On October 25, 1991, Jose Castaneda (Castaneda), a senior border patrol agent and dog handler with the United States Border Patrol, was stationed at the Sierra Blanca border patrol checkpoint located on I-10 East at mile marker 102 with his dog, Amber. Between 9:00 and 10:00 p.m., a Greyhound bus entered the checkpoint. Castaneda explained that when a commercial bus enters the secondary inspection area at the checkpoint, his duties are to open the lower luggage bins of the bus where all the luggage is located, and to inspect the bins with his dog. His usual procedure is to begin with the front bin on the driver's side and work his way back. If the dog "alerts" on something in one of the bins, he proceeds as follows:

> "If the bag is located on the outside, she will put her nose right on it, that bag she is indicating on. If it is located in the middle she will try to get to it. And if she can't get to it, we remove as much of the luggage as we can and we put it in a certain order. And then I take her through all so she can locate which one she's trying to locate."

Castaneda further testified that if Amber "does not indicate in the particular bag that I have put out, then I will dig out some more, bring them out until she does indicate to the bag that she wants."

Castaneda and Amber began inspecting the luggage bins on the driver's side and, when they got to the middle bin, Amber "got real excited" indicating that she had located something. Castaneda removed four or five bags, laid them out in a row a few inches apart, and ran Amber

by them. Amber alerted to a blue vinyl bag. Castaneda finished "inspecting" the rest of the luggage bins on the bus, and then took the bag, and Amber, into the office. There, the bag was opened, and three brick-shaped objects containing a white powdery substance, along with women's clothing, shoes, jewelry, and a bottle of medication were discovered. The white powdery substance field-tested positive for cocaine. The bag had no identification on it, only a claim ticket to Birmingham, Alabama. Castaneda told Agent Weaver of his discovery, and the number and destination of the ticket on the bag. Weaver reboarded the bus to determine if anyone had the matching claim ticket. He stood at the front of the bus and asked all the passengers to show him their claim ticket. Only appellant and Anthony were travelling to Birmingham, Alabama, and appellant had a claim ticket that was one number in sequence from the claim ticket on the bag containing the contraband.[1] Appellant, who was sitting at the back of the bus, appeared nervous to Weaver, and told him "that black bag doesn't belong to me" referring to the bag containing the cocaine.[2] Because of appellant's nervousness and because appellant denied ownership of the black bag, Weaver removed him from the bus and took him into the checkpoint office. There, Castaneda asked appellant who the medication bottle belonged to, and appellant responded that it belonged to his girlfriend. Weaver went back to the baggage bin of the bus and removed the luggage corresponding the claim ticket found on appellant. A 9 mm semi-automatic weapon was discovered in that bag. appellant was placed under arrest, read his rights, and stated that the weapon was his but that the narcotics did not belong

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[1] The number of the claim ticked on the bag containing the cocaine was 229563. The number of the claim ticket found on appellant was 229562.

[2] Weaver speculated that appellant observed the black bag being taken off the bus by Castaneda.

to him. Anthony[3] was also arrested, read her rights, and she stated that the substance in the bag was cocaine, and that she knew who it belonged to, but would not state who that person was.

At approximately 1:45 in the morning, agents Salvador Martinez and Jack Geller of the Drug Enforcement Administration interviewed Anthony and appellant in the holding cell at the checkpoint. Anthony stated that she and appellant had flown from Birmingham, Alabama, to Los Angeles, California, on October 24, 1991, in order to pick-up some packages and transport them by bus back to Birmingham, Alabama. Appellant identified the source of the cocaine by first name, and gave details concerning where he was to drop off the package.

On November 14, 1991, appellant and Anthony were named in a two-count indictment issued out of the Pecos Division of the Western District of Texas, and were charged with conspiring to possess with intent to distribute more than five hundred (500) grams of cocaine, a Schedule II Controlled Substance, contrary to Title 21, United States Code, Section 841(a)(1), in violation of Title 21, United States Code, Section 846 (Count One), and possessing with the intent to distribute more than five hundred (500) grams of cocaine, a Schedule II Controlled Substance, in violation of Title 21, United States Code, Section 841(a)(1) (Count Two).

Appellant filed a motion to suppress the evidence, alleging that the discovery of contraband in his bag that was checked in the baggage compartment of the Greyhound bus in which he was travelling was the result

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[3] Anthony had voluntary gotten off the bus and was looking for appellant and her belongings.

of an illegal search and seizure conducted by border patrol agents. On December 23, 1991, after hearing evidence, the district court denied said motion.

Thereafter, on January 22, 1992, appellant waived a jury trial and agreed that the district court could consider the testimony and other evidence presented at the hearing on the motion to suppress previously heard. Having considered said evidence, the district court found appellant guilty as charged in both courts of the indictment. The charges against Anthony were dismissed.

On March 16, 1992, the district court sentenced appellant to concurrent sentences of ninety (90) months imprisonment, followed by four (4) years of supervised release, and a special assessment of $100.00.

On appeal, appellant argued that the scope of the temporary detention of the Greyhound bus entering the Sierra Blanca checkpoint which resulted in the seizure of contraband from appellant's bag was illegal and in violation of the Fourth Amendment to the United States Constitution, and that absent appellant's incriminating statements obtained as the result of an illegal arrest, the evidence was insufficient to sustain his convictions for conspiring to possess and possessing with the intent to distribute over 500 grams of cocaine.

The Fifth Circuit disagreed. With respect to the first point, the Court held that appellant had no reasonable expectation of privacy regarding his checked luggage. And, with respect to the second point, the Court listed ten factors which provided the agents with probable cause to arrest appellant. Thus, his incriminating statements were not the result of a Fourth Amendment violation.

REASONS FOR GRANTING THE WRIT

I. THE POLICY OF THE UNITED STATES BORDER PATROL OF OPENING THE LUGGAGE BINS OF GREYHOUND BUSES THAT PASS THROUGH PERMANENT CHECKPOINTS AND SUBJECTING THE INTERIOR TO A CANINE SNIFF EXCEEDS THE PERMISSIBLE BOUNDS GRANTED BY THE SUPREME COURT IN *MARTINEZ-FUERTE* FOR TEMPORARY DETENTIONS AT PERMANENT CHECKPOINTS.

In *United States v. Martinez-Fuerte,* 428 U.S. 543, 566, 96 S.Ct. 3074, 3087, 49 L.Ed.2d 116 (1976), the Supreme Court held that

> "stops for brief questioning routinely conducted at permanent checkpoints are consistent with the Fourth Amendment and need not be authorized by warrant. The principal protection of Fourth Amendment rights at checkpoints lies in appropriate limitations on the scope of the stop. *See Terry v. Ohio,* 392 U.S., at 24-27, 88 S.Ct., at 1881-83; *United States v. Brignoni-Ponce,* 422 U.S., at 881-882, 95 S.Ct., at 2580-2581."

The border patrol agent "may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." *United States v. Brignoni-Ponce,* 422 U.S. 873, 881-82, 95 S.Ct. 2574, 2580, 45 L.Ed.2d 607 (1975).

As stated above, the Court held that since appellant

had no reasonable expectation of privacy in his checked luggage, no violation occurred. However, the issue presented was not whether *appellant* had a reasonable expectation of privacy in his checked luggage, but whether the *border patrol agents* exceeded their authority at the border patrol checkpoint when they opened the luggage bins of the Greyhound bus and subjected the interior to a canine sniff. The search in the present case *did not* occur at an airport. The search occurred at a border patrol checkpoint. The authority to search at a border patrol checkpoint has been strictly limited by this Court. Absent probable cause, *Martinez-Fuerte* and *Brignoni-Ponce* permit border patrol agents to only question persons passing through a checkpoint concerning their citizenship and immigration status, and may further ask them to explain suspicious circumstances. **No further detention is permissible.** Since the agents in the present case exceeded the permissible scope of the temporary detention by opening the luggage bins of the Greyhound bus and subjecting the interior to a canine sniff, all evidence discovered as the result thereof should have been suppressed.

II. APPELLANT'S INCRIMINATING STATEMENTS WERE THE RESULT OF AN ILLEGAL ARREST IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

There is no doubt that when the border patrol agent removed appellant from the Greyhound bus and took him to the checkpoint office, there occurred "a seizure equivalent to an arrest that must be justified by probable cause." *United States v. Fernandez*, 887 F.2d 564, 567 (5th Cir. 1989) (citing *United States v. Berry*, 670 F.2d 583, 602 (5th Cir. 1982)). The requirements for a warrantless arrest are "whether, at the moment the arrest was made, the of-

ficers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964).

The record established that the border patrol agents relied upon the following facts to justify the seizure of appellant from the Greyhound bus:

1. Three bricks of suspected cocaine were discovered in a blue vinyl bag in the luggage compartment of a Greyhound bus. The bag had no name attached to it but did contain a claim ticket to Birmingham, Alabama. Inside of the bag were **women's** clothing, shoes, jewelry, and a bottle of medication.

2. Only two passengers were travelling to Birmingham, Alabama. These passengers were appellant and a **female passenger,** identified as Anthony. Appellant and Anthony were not seated together on the bus.

3. According to one of the agents, appellant appeared nervous, was not dressed appropriately,[4] and volunteered that the bag the agents had seized was not his.

4. Appellant had a claim ticket that was one number different than the claim ticket on the bag containing the cocaine.

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[4] The agent testified that appellant was wearing "a very expensive jumpsuit", and "didn't look like he belonged on the bus."

The facts as set out above fail to provide probable cause for appellant's arrest. *Compare United States v. Fernandez, supra,* where border patrol agents discovered two suitcases at the airport in El paso, Texas, destined for New York in which they reasonably believed contained marijuana. Only two passengers on the flight were headed to New York. One of the passengers was an older businessman who did not fit the drug courier profile. The other passenger, Fernandez, was a casually dresssed female who was travelling alone. Agents at the Dallas airport, where the flight had a layover, approached Fernandez and asked to speak to her. Fernandez was nervous and her hands were shaking, and she had a large amount of cash in her possession. The agents discovered that she had paid for her ticket with cash, and that the ticket slightly misspelled her name and did not have any baggage claim tickets attached. This Court found that "[a]ll of these facts, taken together, clearly gave [the agent] the requisite probable cause to arrest Fernandez as a person responsible for the suitcases of marijuana." *Id.,* at 567.

The facts in the present case were clearly distinguishable. Inside the bag containing the cocaine, the agents also discovered **women's** clothing, jewelry, and shoes. There was nothing found within the bag that would connect a male individual to it. Furthermore, the border patrol agent admitted that when he reboarded the bus to question the passengers, he discovered that Anthony was travelling to Birmingham, Alabama, and that her ticket *did not* have a baggage claim check attached to it. And, as stated above, Anthony and appellant were not seated together. On the other hand, appellant presented a ticket to Birmingham, Alabama, with a baggage claim ticket attached and, aside from his nervousness which is certainly not unreasonable under the circumstances, there was absolutely nothing else to connect him with the cocaine discovered

in the blue vinyl bag. Appellant submits that his arrest was illegal and in violation of the Fourth Amendment to the United States Constitution. All statements following this illegal arrest should have been suppressed. *Brown v. Illinois*, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). Absent the incriminating statements made by appellant following his illegal arrest, the evidence as to his guilt was insufficient as a matter of law to establish his guilt beyond a reasonable doubt.

CONCLUSION

For the forgoing reasons, petitioner prays this Honorable Court will issue a writ of certiorari and review the opinion below.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8138
(Summary Calendar)

FILED
OCT 9 1992

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

TONY ROBINSON,

Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

(P-91-CR-78(1))

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Defendant-Appellant Tony Robinson appeals his conviction on charges of possession and conspiracy to

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profesion." Pursuant to that Rule, the Court has determined that this opinion should not be published.

possess more than 500 grams of cacaine with intent to distribute, in violation of 21 U.S.C. §§ 841 and 846. He insists that evidence obtained in an unconstitutional search of baggage from a luggage compartment in a bus, and from statements he made during an unconstitutional arrest should have been suppressed. He also argues that when such tainted evidence is excluded, the remaining evidence is insufficient to support his conviction. Finding no reversible error, we affirm.

I

FACTS AND PROCEEDINGS

Robinson and Beatrice Anthony were passengers on a Greyhound bus which entered the Sierra Blanca checkpoint near the border between the United States and Mexico. The bus was referred to a secondary inspection area where a border patrol agent entered the bus and began questioning passengers regarding their citizenship. At the same time, another agent began inspecting the baggage compartments of the bus with the assistance of "Amber," a dog trained in narcotics detection. When Amber "alerted" to one of the luggage compartments, the agent removed several bags from it. Amber then alerted to a particular bag.

The agent took the bag into a checkpoint building, opened that bag, and found some women's apparel, a prescription bottle, and several bricks of cocaine wrapped in duct tape. A handwritten notation on the claim check attached to the bag identified its destination as Birmingham, Alabama. The agent who was on the bus was advised of the contents of the bag and of the serial number on the claim check. That agent began examining each passenger's baggage claim checks to determine whether any number matched the number on the bag in question. That agent testified

that when approached, Robinson appeared nervous and was shaking. When the agent asked to see Robinson's baggage claim check, Robinson stated unresponsively, "That black bag doesn't belong to me."

The ticket on the subject bag bore the number 22-95-63. The agent never found anyone possessing the matching claim check. Robinson, however, was in possession of claim check number 22-95-62. That check revealed that Robinson's destination was Birmingham, Alabama. According to the agent, his suspicions were further aroused because, based on his experience as a border patrol agent, Robinson's clothes were unusually "flashy" in comparison to the clothes typically worn by commercial bus passengers.

Robinson was escorted off the bus and was advised of his constitutional rights. He identified the prescription bottle as belonging to his girlfriend. A handgun was found inside another bag, the one matching Robinson's claim check. Fourteen thousand dollars in cash was found on Robinson's person.

Shortly after Robinson was escorted off the bus, Ms. Anthony entered the building in which Robinson was being questioned. She asked for her personal belongings and whether Robinson was going to be detained. After Anthony acknowledged ownership of the personal articles in the bag containing the cocaine, she was detained and advised of her constitutional rights.

A Drug Enforcement Agency agent was contacted. When the agent arrived at the checkpoint, Robinson and Anthony were again advised of their constitutional rights. Robinson subsequently admitted the source of the cocaine to the DEA agent. Anthony stated that the pistol belonged

to Robinson.

A two-count indictment was returned against Robinson and Anthony for possession of more than 500 grams of cocaine with intent to distribute (Count 1) and for conspiracy to possess more than 500 grams of cocaine with intent to distribute (Count 2).

Robinson and Anthony moved to suppress their statements given following their detention, as well as the physical evidence seized at the checkpoint. After a hearing, Robinson agreed with the government to waive his right to a jury trial and to permit the case to be tried on testimony introduced at the suppression hearing. The government agreed to dismiss the indictment against Anthony. The district court denied the motion to suppress and found Robinson guilty on both counts. Robinson timely appealed.

II

ANALYSIS

A. *Suppression of Evidence*

Robinson claims that the evidence obtained as a result of the inspection of the luggage compartment of the bus should have been suppressed. He argues that the acts of the agents exceeded the permissible scope of a non-probable cause inspection during a temporary detention at a permanent border checkpoint.

The Sierra Blanca checkpoint is not the functional equivalent of a border. *United States v. Pierre,* 958 F.2d 1304, 1308 (5th Cir. 1992) (en banc), *petition for cert. filed* Aug. 11, 1992. Accordingly, full customs and immigration searches are not allowed. *Id.* While government agents at

non-border checkpoints may refer vehicles to secondary inspection areas for any or no reason, vehicle searches must be based on probable cause or consent. *Pierre*, 958 F.2d at 1308 (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 566-67, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)). In *Pierre*, we explained the standard for evaluating an agent's conduct at a non-border checkpoint stop:

> The Fourth Amendment bars only unreasonable searches and seizures. The reasonableness inquiry is driven by a balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion. However, the intrusiveness of the search is not measured so much by its scope as by whether it invades an expectation of privacy that society is prepared to recognize as reasonable. For fixed checkpoints, such as the one at Sierra Blanca, the [Supreme] Court has struck the balance by limiting the length and nature of questioning allowed during the stops.

Pierre, 958 F.2d at 1308-09 (emphasis in original, citations and internal quotations omitted).

Robinson had no reasonable expectation of privacy regarding his checked luggage while it was in the luggage compartment of the bus. In *United States v. Lovell*, 849 F.2d 910 (5th Cir. 1988), we held that an airline passenger who had checked his bags before boarding a commercial airliner had no reasonable expectation of privacy in a semi-public baggage area once the passenger had entrusted the custody of his bags to a common carrier. *Id.* at 915.

Similarly, in *United States v. Goldstein*, 635 F.2d

356, 361 (5th Cir. Unit B), *cert. denied*, 452 U.S. 962 (1981), we held that the removal of a passenger's baggage from an airline baggage cart did not constitute a seizure within the meaning of the Fourth Amendment because the defendant had no reasonable expectation of privacy with respect to the handling of the bags after entrusting them to the airline by checking. *Id.* at 361. We reasoned that the government agents who removed the bags were in the semi-public baggage area with permission of the airline, and that the defendant had released his luggage to the custody of the airline, relinquishing control over who would handle his bags. *Id.*

In the instant case, Robinson relinquished control over the bag when he checked it with the bus company and the bag was placed in a semi-public space on the bus. Under *Lovell* and *Goldstein* the removal of the bag from the luggage compartment did not constitute a seizure for purposes of the Fourth Amendment.

It is settled that a " 'canine sniff' by a well trained narcotics detection dog . . . [does] not constitute a 'search' within the meaning of the Fourth Amendment." *United States v. Place*, 462 U.S. 696, 707, 103 S.Ct. 2637, 77 L.Ed.2d 110 (1983); *see United States v. Dovali-Avila*, 895 F.2d 206, 207-08 (5th Cir. 1990); *Goldstein*, 635 F.2d at 361-62.

Robinson argues that the agents were only permitted to satisfy themselves regarding the immigration status of the bus passengers. Having done that, no further detention was permitted. This argument was rejected in *United States v. Muniz-Melchor*, 894 F.2d 1430, 1436-37 (5th Cir.), *cert. denied*, 495 U.S. 923 (1990). The presence of narcotics in a bag checked onto the bus justified additional questioning of bus passengers in an effort to determine whether any

of them could be linked to the bag.

Robinson does not challenge the agent's actions in opening and searching the interior of the bag without first obtaining either consent or a search warrant. Those actions were permissible under the rule in *California v. Acevedo*, ___ U.S. ___, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991), which permits police to search containers found in vehicles without a warrant if the search is supported by probable cause. *Id.* at 1991; *see Goldstein*, 635 F.2d at 362 (when narcotics dog alerted to container, there was probable cause to support issuance of search warrant to search container).

B. *Probable Cause to Arrest*

Robinson contends that the agents had insufficient probable cause to arrest him. As a warrantless arrest must be based upon probable cause, there must be facts and circumstances within the agents' collective knowledge, garnered from reasonably trustworthy information sources, sufficient to justify belief by a reasonable person that the suspect had committed or was committing a crime. *Charles V. Smith*, 894 F.2d 718, 723 (5th Cir.) *cert. denied*, 111 S.Ct. 384 (1990). The existence of probable cause is determined in light of the totality of the circumstances. *United States v. Antone*, 753 F.2d 1301, 1304 (5th Cir.), *cert. denied*, 474 U.S. 818 (1985). "A succession of otherwise 'innocent' circumstances or events . . . may constitute probable cause when viewed as a whole. [The court does] not consider the several factors in isolation, but rather in their interrelated context, where each may reinforce the other, so that the laminated total may indeed be greater than the sum of its parts." *Muniz-Melchor*, 894 F.2d at 1438.

The arresting agents had reliable knowledge of the

following facts and circumstances at the time of Robinson's arrest:

1. Three bricks of cocaine were found in a bag in the luggage compartment of the bus;

2. A claim check attached to that bag reflected Birmingham, Alabama, as its destination;

3. Robinson was a passenger on the bus;

4. Robinson's destination was Birmingham, Alabama;

5. The bag contained women's clothing, not men's clothing;

6. Robinson unresponsively blurted out that "That black bag doesn't belong to me" when asked to present his claim check;

7. A claim check was attached to the bag bearing number 22-95-63;

8. Robinson possessed a claim check numbered 22-95-62, and claim check number 22-95-63 was never found;

9. Robinson appeared nervous and was visibly shaking;

10. Based on his experience as a border patrol officer, the agent believed Robinson was dressed atypically for a commercial bus passenger.

The agents knew a crime was being committed and

the foregoing facts, taken together, could lead a reasonable person to conclude that there was a "fair probability" that Robinson was linked to the crime. *See Antone,* 753 F.2d at 1304. Therefore, the warrantless arrest of Robinson was based on probable cause and did not contravene the Fourth Amendment. Accordingly, the arrest did not taint Robinson's subsequent confession.

C. *Sufficiency of Evidence*

Finally, Robinson contends that absent the incriminating statements which he made following his arrest, there was insufficient evidence to support his conviction. He does not argue that there was not sufficient evidence if the statements were admissible. As we have found that the arrest was not illegal, the statements are admissible so Robinson's argument fails.

> When a jury trial has been waived and a bench trial held [the Court] must determine whether the findings [of the district court] are supported by any substantial evidence. It is not [the Court's] function to make credibility choices or to pass upon the weight of the evidence. The test is whether the evidence is sufficient to justify the trial judge, as trier of the facts, in concluding beyond a reasonable doubt that the defendant was guilty. When reviewing the sufficiency of the evidence to support a conviction, we view the facts and all reasonable inferences therefrom in the light most favorable to the Government.

United States v. Rosas-Fuentes, ____ F.2d ____ (5th Cir. Aug. 19, 1992, No. 91-8414, slip. p. 6934) (citations and internal quotations omitted).

To prove the conspiracy count, the government had

to prove "(1) the existence of an agreement between two or more persons to violate the narcotics laws, (2) knowledge of the conspiracy, and (3) voluntary participation in the conspiracy." *Id.* The possession count required proof that the "defendant knowingly possessed the contraband with intent to distribute it." *Id.* at ____ (slip p. 6935).

Anthony informed the DEA agent that she and Robinson had flown from Birmingham to Los Angeles to pick up some packages and transport them back to Birmingham. She acknowledged knowing who owned the bag, and testified that the pistol belonged to Robinson.[1] Robinson himself identified the source of the drugs and the persons in Birmingham who were supposed to receive them. He admitted he knew what was in the bag.

Although the government's evidence supporting the conspiracy count is not as overwhelming as the evidence of possession, the district court's finding that Robinson knowingly and voluntarily conspired with one or more among (a) his supplier in Los Angeles, (b) the intended recipient of the drugs in Birmingham, and (c) Anthony, to violate the narcotics laws was supported by substantial evidence.

AFFIRMED.

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[1] Robinson did not object to the admissibility of Anthony's statements.